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NO. 82-6262

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

ROBERT LEWIS WALLACE,

Petitioner,

v.

WALTER D. ZANT, WARDEN,
GEORGIA DIAGNOSTIC AND
CLASSIFICATION CENTER,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1.

Whether or not the trial court's instructions operated to shift the burden of proof or to relieve the state from proving an essential element of the crime of murder?

2.

Whether or not Petitioner received effective assistance of counsel?

3.

Whether or not Petitioner was deprived of due process during his presentence hearing, as a result of the trial court's refusal to permit a defense witness from testifying as to her opinion about the ultimate sentence which should have been imposed on the Petitioner?

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PART ONE

STATEMENT OF THE CASE

The Petitioner, Robert Lewis Wallace, was indicted by the July Term, 1979 Greene County, Georgia grand jury on charges of murder, aggravated assault, motor vehicle theft, and driving under the influence of alcohol. (R. 28-30).[1] He received the death penalty for murder, a twenty year consecutive sentence for aggravated assault, a seven year sentence for motor vehicle theft and a one year consecutive sentence for driving under the influence of alcohol. (R. 136-140).

[1] References to the record of Petitioner's case in the Superior Court of Greene County shall be referred to in this brief as (R.). References to the pagination of the transcript of Petitioner's trial shall be referred to as (T.). References to the transcript of Petitioner's state habeas corpus evidentiary hearing in the Superior Court of Butts County, Georgia, shall be referred to in this brief as (HT.).

Petitioner's convictions and sentences were affirmed by the Georgia Supreme Court on direct appeal, and thereafter his petition for a writ of certiorari and petition for rehearing were denied by this Court. Wallace v. State, 248 Ga. 255, 282 S.E.2d 323 (1981), cert denied, Wallace v. Georgia, ___ U.S. ___, 102 S.Ct. 1291 (1982), rehrng. denied., ___ U.S. ___, 102 S.Ct. 1743 (1982).

Following the granting of Petitioner's motion for a change of venue, the trial was held in the Superior Court of Baldwin County, Georgia, on February 11-15, 1980, and Petitioner was found guilty on all charges, after being found competent to stand trial. (R. 28). Petitioner's execution date was rescheduled for April 21, 1982, and on April 15, 1982, he filed a habeas corpus petition in the Superior Court of Butts County, Georgia. A hearing was held on the state habeas petition on May 13, 1982. That court denied relief in an order dated August 5, 1982, and on November 22, 1982, the Georgia Supreme Court denied Petitioner's application for a certificate of probable cause to appeal. Thereafter, Wallace filed this second petition for a writ of certiorari.

PART TWO

STATEMENT OF THE FACTS

The evidence adduced at Petitioner's trial demonstrated that during the early morning hours of May 16, 1979, he was transported to the Union Point, Georgia Police Station in Greene County, Georgia on suspicion of driving under the influence of alcohol. Upon his arrival at the police station, and after being informed that it would be necessary to incarcerate him, Petitioner seized an opportunity to gain possession of a pistol from one of the arresting officers, and thereafter shot Officer Thomas Rowry and Officer Michael Cook. Officer Rowry eventually died as a result of the shooting, but Officer Cook survived and eventually testified at Petitioner's

trial. Petitioner fled the scene in a stolen police car, and was eventually arrested in Atlanta, Georgia on May 17, 1979, while an Atlanta police officer was investigating a burglary.

Officers Cook and Rowry had stopped Petitioner on a Georgia highway shortly after 12:00 a.m. on May 16, 1979, when they had observed his automobile driving off the side of the roadway on several occasions, and swerving into the opposite lane of traffic. (T. 227, 336). When Petitioner failed a field test for alcohol, the officers transported him to the police station. (Id.) At the police station the officers then administered Petitioner an intoximeter test which he also failed. (T. 228-229). At that point Petitioner was placed under arrest, and was informed that it would be necessary to detain him in jail for at least four hours. (T. 229-330).

As Officer Cook began to lead the Petitioner to a jail cell, Petitioner suddenly attacked him. While wrestling for possession of Officer Cook's pistol, Petitioner pulled the trigger and shot Officer Cook in his lower abdomen. (T. 229, 231). Officer Rowry, who had temporarily left the room after completing the intoximeter testing procedure, returned to find Officer Cook wounded and the Petitioner facing him with a pistol. (T. 232). As Rowry bolted for the outside door Petitioner shot him. Officer Cook related that was the last time he saw Officer Rowry alive. Petitioner then turned, walked back to where Officer Cook was lying on the floor, and pointed the pistol approximately 6 to 8 inches from his head. As Officer cook turned his head in an attempt to avoid a fatal shot, Petitioner fired, but the bullet missed. The pistol was close enough to Officer Cook's head to cause powder burns on his chin and neck. (T. 233).

After this second shot was fired, Petitioner fled from police headquarters. (T. 237-238). Seeing blood stains on the floor, Officer Cook surmised that Officer Rowry had been wounded. (T. 238). Officer Rowry's dead body was eventually

found approximately one block from the police station. (T. 262-264). He had been shot in the throat. (T. 263).

Following the shooting, Petitioner stole one of the parked police cars and drove to a densely wooded area. (T. 339-340). After hearing that Officer Rowry had died, Petitioner convinced his brother to drive him to Atlanta, and he was eventually captured by an Atlanta city police officer who was investigating a burglary. At the time of Petitioner's capture, the Atlanta police officer had shined his flashlight into a basement area, and observed the Petitioner who appeared to be reaching into another room for a loaded shotgun. (T. 340, 268-269, 279-280, 283). Also found in the room with the Petitioner was a .22 caliber handgun. (T. 270). Upon questioning, Petitioner admitted that he was Robert Lewis Wallace, and he was thereafter taken into custody. (T. 272-274, 284, 288).

Petitioner admitted shooting the police officer and taking the vehicle. He was in possession of keys to the stolen police vehicle, and after his arrest directed officers to the location of the police car which he had hidden. (T. 228, 267, 372). As previously noted, Petitioner received the death penalty for the murder of Officer Rowry. The death penalty was supported by two aggravating circumtances, those being: (1) that the offense of murder was committed against a peace officer while he was engaged in the performance of his official duties [O.C.G.A. § 17-10-30(b)(8); Ga. Code Ann. § 27-2534.1(b)(8)], and (2) the murder was committed by a person in the lawful custody of a police officer. [O.C.G.A. § 17-40-30(b)(9); Ga. Code Ann. § 27-2534.1(b)(9)]. (T. 568).

Additional facts will be referred to in the following portion of this brief which may be necessary to more fully explain Respondent's arguments.

PART THREE

REASONS FOR NOT GRANTING THE WRIT

I. NEITHER THE TRIAL COURT'S INSTRUCTIONS TO THE JURY NOR ITS EVIDENTIARY RULINGS OPERATED TO SHIFT THE BURDEN OF PROOF TO THE PETITIONER, OR TO RELIEVE THE STATE OF PROVING THE ESSENTIAL ELEMENT OF MALICE WHICH WAS REQUIRED TO SUPPORT PETITIONER'S CONVICTION.

Under Petitioner's first argument he asserts that the trial court's instructions to the jury, as reflected on pages 452 and 458-459 of the trial transcript, operated to shift the burden of proof to the Petitioner on the issue of malice, thus relieving the State from having to prove all of the essential elements of the crime of murder. Additionally, he contends in his argument that this error was magnified by the trial court's allegedly erroneous ruling which prevented Petitioner from introducing testimony relevant to the issue of his intent.

On direct appeal to the Georgia Supreme Court, Appellant also raised the aforesaid issues. Under O.C.G.A. § 16-5-1; Ga. Code Ann. § 26-1101, malice is defined as follows:

> Express malice is that deliberate intention unlawfully to take the life of another human being which is manifested by external circumstances capable of proof. Malice shall be implied where no considerable provocation appears and where all the circumstances of the killing show an abandoned and malignant heart.

The trial court instructed the jury in accordance with this code section. (T. 452). Upon reviewing that portion of the trial court's instruction relating to the aforesaid definition

on implied malice, the Georgia Supreme Court, on direct appeal of Petitioner's conviction, concluded that the instruction clearly did not operate in a burden shifting manner or to create an impermissible inference. Wallace v. State, 248 Ga. 255, 262, 282 S.E.2d 323 (1981), citing, Frankin v. State, 245 Ga. 141, 263 S.E.2d 666 (1980); Burney v. State, 244 Ga. 33, 257 S.E.2d 543 (1979). This ruling by the Georgia Supreme Court was correct. The aforesaid instruction simply indicates to the jury that malice shall be implied where all of the circumstances actually demonstrate that malice exists. Recently the Eleventh Circuit Court of Appeals noted that the aforesaid instruction tells the jury that a finding of malice may be based entirely on circumstantial evidence. Hance v. Zant, 696 F.2d 940, 953 (11th Cir. 1983). In reviewing the exact same instruction, the Eleventh Circuit stated:

> It does not relieve the prosecution from its burden of proving malice beyond a reasonable doubt. In light of the court's explicit prior directions about circumstantial evidence, we find no error in the court's instruction on malice.

As in Hance, the trial court in Petitioner's case also gave extensive instructions on circumstantial evidence, stating as follows:

> Circumstantial evidence is that which only tends to establish the issue of proof of various facts sustaining by their consistency, the hypothesis, or the supposition claimed. To warrant a conviction on circumstantial evidence, the proved facts shall not only be consistent with the hypothesis or supposition of guilt, but shall exclude every other reasonable

hypothesis, save that of the guilt of the accused. When the guilt of the Defendant depends on circumstantial evidence, the rule is that each separate fact or issue linked in the chain of circumstances from which the deduction of guilt is sought to be drawn, must be clearly proven beyond a reasonable doubt. A fact or circumstance not so clearly proven shall not be considered by the Jury as part of the chain of circumstances but should be rejected by them. The circumstances so proven must be a part of a complete unbroken chain, and must not only be consistent with the Defendant's guilt but must exclude every other reasonable hypothesis or supposition save that of the guilt of the accused. If any one or more of the circumstances relied on by the State are not so clearly proven and for that reason you reject one or more of these circumstances relied upon, then you would inquire whether the remaining circumstances you believe are so clearly proven are consistent with the Defendant's guilt and inconsistent with any other reasonably hypothesis or supposition save that of his guilt. (T. 448-449).

The jury was also instructed that malice is an essential ingredient of the offense of murder, and that it is the unlawful intention to kill a human being without excuse, justification or mitigation. The jury was instructed that a person will not be presumed to act with criminal intention, but such intention could be found upon consideration of the words, conduct, demeanor, motive and all other circumstances connected

with the act for which the accused is prosecuted. (T. 458). The jury was also instructed that a specific intent to commit the crime charged in the indictment and each count thereof is an essential element that the state must prove beyond a reasonable doubt. (T. 458, 459). In light of the aforesaid, Respondent submits that it is unnecessary for this Court to grant the writ to review Petitioner's challenge to the trial court's instruction on implied malice, which was given pursuant to O.C.G.A. § 16-5-1; Ga. Code Ann. § 26-1101.

Petitioner has also challenged the additional instructions which were given by the trial court which related to criminal intention, and which were as follows:

> I charge you that a person will not be presumed to act with criminal intention but the trier of facts . . ., may find such intention upon consideration of words, conduct, demeanor, motive and all other circumstances connected with the act for which the accused is prosecuted. A specific intent to commit the crime . . . is an essential element that the State must prove beyond a reasonable doubt. Intent may be shown in many ways provided the jury finds that it existed from the evidence produced before them. It may be inferred from the proven circumstances or by the acts and conduct, or <u>it may be presumed when it is the natural and necessary consequence of the act</u>." (T. 458-459).

Petitioner asserts that the underlined, aforesaid instruction operated in an unconstitutional, burden shifting manner in contravention of this Court's ruling in <u>Sandstrom v. Montana</u>, 442 U.S. 510 (1979). This issue was also addressed specifically by the Georgia Supreme Court which concluded that,

after reading the instructions in their entirety, the aforesaid presumption did not operate as a conclusive presumption, but merely "allows but does not require . . . the trier of fact to infer the [element of the crime] from proof by the prosecution of the basic [fact] and that places no burden of any kind on the defendant." Wallace v. State, supra, 248 Ga. at 263.

Of course, in analyzing a jury instruction it is axiomatic that the trial court's charge must be considered as a whole. Cupp v. Naughten, 414 U.S. 141, 147 (1973). Careful attention must be afforded to the words actually spoken to the jury, County Court of Ulster County v. Allen, 442 U.S. 140 (1979), and "whether a defendant has been accorded his constitutional rights depends upon the way in which a reasonable juror would have interpreted the instruction." Sandstrom v. Montana, supra, 442 U.S. at 510.

It is clear that in a criminal case it is encumbent upon the State to prove every element of the alleged offense beyond a reasonable doubt, and the State may not shift the burden of proof to the defendant on an essential element of the crime by presuming that ingredient upon the showing of other elements of the offense. Patterson v. New York, 432 U.S. 197, 215 (1977); Mullaney v. Wilbur, 421 U.S. 684 (1975). Nevertheless, permissive inferences or presumptions which allow, but which do not require, the trier of fact to infer an elemental fact from proof by the State of a basic fact, place no burden upon the accused, and are not unconstituional unless, under the facts of the case, there is no rational way a trier of fact could have made the connection as permitted by the inference. Ulster County, supra, 442 U.S. at 157. Ultimately, the test of a presumption's constitutional validity in any given case depends upon whether the evidentiary device undermines the fact finder's responsibility at trial to find the ultimate facts beyond a reasonable doubt. Id., citing In Re Winship, 397 U.S. 358, 364 (1970) and Mullaney v. Wilbur, supra at 702-703, n. 31.

A charge identical to that which has been previously cited, and which is listed on pages 458-459 of the trial transcript, was also considered in Hance v. Zant, supra, and was found not to constitute a burden shifting charge. In Hance, the Eleventh Circuit noted that immediately preceeding the challenged portion of the charge in question, the trial court had instructed the jury that the accused was presumed to be innocent until proven guilty; that a person will not be presumed to act with criminal intention; that the state must prove the existence of criminal intent beyond a reasonable doubt; that intent must be found from the evidence produced at trial; and that circumstantial evidence alone would not justify a finding of guilt unless the circumstances are entirely consistent with the defendant's guilt, are wholly inconsistent with any reasonable theory of the defendant's innocence and are so convincing as to exclude a reasonable doubt of the defendant's guilt. The court noted that these prior instructions made it unlikely that the jury could have interpreted the challenged instruction on intent to be an impermissible burden shifting or conclusive presumption. Id. at 953. The jury in Petitioner's case was instructed similarly to the jury in Hance. Additionally, as in Hance, the court charged only that intent may be presumed when it is the natural and necessary consequence of the act. "A reasonable jury could only interpret this language as permitting the inference described--they were allowed to draw the inference, but they were not obligated to do so." Hance v. Zant, 696 F.2d at 953.

Finally, evidence objectively demonstrating Petitioner's criminal intent was overwhelming, and under such circumstances, even if the challenged instruction was burden shifting, any error would have been harmless beyond reasonable doubt. Mason v. Balkcom, 669 F.2d 222, 226-227 (5th Cir. 1982); Johnson v. Balkcom, 695 F.2d 1320, 1323 (11th Cir. 1983).

It is also clear that the trial court properly excluded Petitioner's proffered testimony from psychiatrist Dr. Hirani,

pertaining to Petitioner's degree of criminal responsibilty at the time of the crime. Defense counsel, in addressing the court during argument, stated that the defense was not contending that Petitioner was insane, or that he could not distinguish between right and wrong at the time of the commission of the crime. (T. 392-393, 394). Under Georgia law, mere weakness of mind or a mental abnormality which does not deprive a defendant of the ability to distinguish between right and wrong so as to fall under O.C.G.A. § 16-3-2; Ga. Code Ann. § 26-702, is not sufficient as a defense. Reece v. State, 212 Ga. 609(3) (1956); Berryhill v. State, 235 Ga. 549, 553 (1975), cert. denied, 429 U.S. 54 (1977). Although Petitioner contends that the excluded testiomy could have been relevant to the jury's consideration of the facts of this case pertaining to the issue of specific intent or malice; nevertheless, since the Petitioner was not contending that his alleged mental illness had deprived him of the ability to distinguish between right and wrong, the testimony of Dr. Hirani was immaterial and irrelevant. Wallace v. State, supra, 248 Ga. at 262.

For all the aforesaid reasons, Respondent respectfully submits that this Court should refuse to grant the writ to review Petitioner's first argument.

II. PETITIONER RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL.

Under Petitioner's second argument, he asserts that he received ineffective assistance of counsel during the sentencing phase of his trial, because of trial counsel's failure to present psychiatric testimony and testimony pertaining to Petitioner's allegedly deprived childhood and difficult family background. Petitioner also claims that trial counsel was ineffective for failing to present evidence pertaining to Petitioner's lack of a criminal record, and as a result of counsel's failure to present testimony from the deceased victim's father to the effect that he did not want Petitioner to be sentenced to death.

Here Petitioner was represented by three attorneys at trial. A defense organization retained attorney Edward Augustine for the sum of $10,000 plus expenses. (HT. 13-14, 78). Attorney Augustine was also assisted by attorneys Katrina Breeding and August Siemon, who provided services on a pro bono basis. (HT. 78; T. 40). Of course, a criminal defendant is constitutionally entitled to competent counsel, whether counsel was appointed or retained. Cuyler v. Sullivan, 446 U.S. 335, 344-345 (1980). The standard for effective assistance of counsel under the Sixth Amendment to the United States Constitution requires that a criminal defendant be provided representation by an attorney reasonably likely to render and rendering reasonably effective assistance. Mylar v. Alabama, 671 F.2d 1299, 1300 (11th Cir. 1982); Nelson v. Estelle, 642 F.2d 903, 906 (5th Cir. 1981); Jones v. Estelle, 622 F.2d 124 (1980).

The constitutional standard does not require errorless counsel, nor counsel judged ineffective by hindsight. Winfrey v. Maggio, 664 F.2d 550, 552 (5th Cir. 1981); United States v. Johnson, 615 F.2d 1125 (5th Cir. 1980); Clark v. Blackburn, 619 F.2d 431 (5th Cir. 1980). The totality of the circumstances surrounding the trial proceedings and the entire record must be considered in examining the performance of counsel. Washington v. Estelle, 648 F.2d 276 (5th Cir. 1981); Lee v. Hopper, 499 F.2d 456 (1974). "It is within this framework of the totality of the circumstances, that we judge the 'fundamental fairness' of the trial and ultimately counsel's ineffectiveness." Nelson v. Estelle, supra, at 906.

A habeas corpus petitioner who seeks to overturn his conviction on the grounds of ineffective assistance of counsel must prove his entitlement to relief by a preponderance of the evidence, and he must also show prejudice which worked to his actual and substantial disadvantage. Washington v. Strickland, 693 F.2d 1243, 1258, 1262 (5th Cir. 1982).

As noted previously, the record in the trial court and the state habeas court established that Mr. Edward Augustine was lead counsel for the Petitioner and was assisted by August Siemon and Katrina Breeding. Additionally, Mr. Augustine was assisted in his investigation of the case by Reverend G. Lee Avery. (HT.13, 78). It appears that Reverend Avery and Ms. Breeding were utilized as investigators, and they contacted numerous potential witnesses during the months preceding Petitioner's trial. In addition to interviewing witnesses about the facts of the case, potential character witnesses were interviewed as well as individuals who could provide information pertaining to jury selection. (HT. 15, 30, 135). All the results of the investigative efforts were related to attorney Augustine. (HT. 17, 27, 30-31).

The trial transcript shows that at the presentence hearing, the defense called Reverend Avery, Doreatha Jenkins (referred to in the trial transcript as Aretha Jenkins), and Mr. Roger Wallace. Mr. Roger Wallace is the Petitioner's father, and he testified pertaining to the background of the Petitioner. He related how Petitioner often sniffed gasoline as a youngster, and sometimes would do so two or three times per day. (T. 480). Mr. Wallace testified that this activity extended for a period of two to three years. (T. 481). He also identified the photographs of Petitioner's ramshackle house where he was living at the time of the incident. (T. 482-484). Mr. Wallace also testified that Petitioner's mind tended to wander, and he further testified how Petitioner would get upset when things did not proceed as he wanted them to. (T. 45-46). He also related that his son only had a fifth or sixth grade education. (T. 486).

Ms. Jenkins testified that she had known Robert for most of his life and had been his first teacher. (T. 494). She testified how Robert used to work for her, doing things like cutting the grass, yard work, and painting her porch. She testified how he would appear "kind of wavy" at times and how

he would "stare a lot." (T. 496). She also gave specific examples of how the Petitioner appeared to engage in unusually repetitive actions while working for her, such as replowing the same ground in her garden. (T. 496-497, 500). She also related to the jury that she thought the Petitioner was a very nice person, was easy to get along with, how he used to play with other children quite well, and how he did a beautiful job as far as she was concerned. (T. 497-498, 501).

Reverend Avery also testified about his knowledge pertaining to the Petitioner's background. He indicated that he had known the Wallace family all of his life, and testified in detail pertaining to his contacts with the Petitioner following Petitioner's arrest. Reverend Avery described his extreme difficulty in communicating with the Petitioner, and related that he was unable to even carry on a normal conversation from beginning to end. (T. 506-508). Reverend Avery related that Petitioner told him that on one occasion he saw apparitions, and as an example related to the jury that Petitioner told him that he had observed six bears while they were talking. (T. 508). Avery related that Petitioner would always look in other directions, shuffled his feet, and appeared nervous while Petitioner was talking. He also would allegedly refused to speak about the case, and complained of numerous physical ailments, including cold spots on his body and a swollen head; however, Reverend Avery did not observe these ailments.

Reverend Avery also attempted to communicate with the Petitioner about spirtual matters, and he testified that at one point Petitioner told him that he wanted to accept the Lord. (T. 511). Avery also related that when he talked to the Petitioner on the morning before Mr. Avery's testimony, he observed that Petitioner laughed at inappropriate times, such as when he attempted to talk about the trial. (T. 512-513). Avery also testified that he had visited the Petitioner's home, and described it as a "delapidated shack." (T. 514).

Thus, as the evidence in the trial transcript shows, the defense was able to provide the jury with allegedly mitigating testimony pertaining to Petitioner's background and mental problems. The fact that witness Doreatha Jenkins, now after Petitioner's trial has ended, has decided she could have related additional information pertaining to Petitioner's weird behavior and difficult childhood, does not reflect that trial counsel was ineffective. Moreover, Ms. Jenkins' testimony pertaining to Petitioner's mother having a drinking problem and having left home when he was very young (age 8) is simply not, in any way, mitigating to the crime in this case.

Petitioner also claims that counsel was ineffective in failing to secure testimony from the father of the murder victim, Thomas Rowry, to the effect that Mr. Rowry did not want the Petitioner to be sentenced to death. This testimony was irrelevant and immaterial, and clearly would have been inadmissible at trial. Wallace v. State, supra, 248 Ga. at 263. (See the following argument in this brief addressing this same issue pertaining to witness Jenkins). Petitioner's attorney did attempt to introduce similar testimony from witness Doreatha Jenkins, by asking her whether she thought the Petitioner should be sentenced to death. The trial court sustained the objection (T. 503-503), and the trial court's ruling was affirmed on direct appeal by the Georgia Supreme Court. Id.

Although Petitioner's trial counsel did not call psychiatric witnesses during the sentencing phase of Petitioner's trial, a review of the state habeas transcript shows that this decision amounted to a trial tactic, and as such, should not support the basis for a finding of ineffective assistance. Ordinarily tactical decisions by trial counsel do not rise to a level of ineffective assistance, even if, in retrospect, it appears that counsel's choice was ill-advised. Stanley v. Zant, ___ F.2d ___, No. 81-7615, slip op. 1476 (11th Cir. February 11, 1983); Ford v. Strickland, 696 F.2d 804, 820

(11th Cir. 1983); Profitt v. Wainwright, 685 F.2d 1222, 1250 (11th Cir. 1982).

Although psychiatrists certainly may have been able to testify to Petitioner's schizophrenic or paranoid psychosis which was exhibited prior to trial, none of the psychiatrists could have testified that the Petitioner was insane at the time of the murder. In fact, a review of the psychiatric testimony during Petitioner's competency trial reveals that Petitioner was effectively able to communicate on numerous subjects with Drs. Hirani and Jacobs during their early interviews with him, and they had initially concluded that he was competent to stand trial. (CT. 129, 282-284, 324-325).[2] It was not until February of 1980 and after a short one and one-half hour evaluation of the Petitioner that Dr. Hirani and Dr. Jacobs concluded that Petitioner was not competent to stand trial, i.e., that he did not have sufficient ability to consult with his attorney with a reasonable degree of rational understanding and that he did not have a rational and factual understanding of the proceedings against him. (CT. 324-325). The record does show that Dr. Baccus had examined the Petitioner in August of 1979, and concluded at that time that he exhibited schizophrenic, paranoid-type behavior (CT. 343-348), and that he was mentally incompetent to stand trial. (CT. 348, 354).

However, if these psychiatrists would have testified during the sentencing phase, it is also clear from examining their testimony at the competency hearing, that the district attorney would have been able to elicit testimony that the July, 1979 psychiatric report revealed that at that time Petitioner was able to communicate about the crime, denied hallucinations, and denied any suicide attempts. (CT. 282-284). Dr. Hirani learned that one of the reasons why the Petitioner became incommunicative about the case, was because his attorneys had advised him not to talk about it. (CT. 297). Additionally, Dr.

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[2]References to the pagination of Petitioner's competency trial shall be referred to as (CT.).

Hirani testified that pscyhological testing was not done because Petitioner would not cooperate, even though he appeared to understand what the testers wanted him to do. (CT. 301). Hirani's understanding of Petitioner's lack of cooperation relating to the psychological testing was that it was also a result of Petitioner's discussions with his attorneys. (CT. 301-302). This testimony obviously would have tended to help convince the jury that Petitioner was manipulative and attempting to be deceptive to avoid responsibility for his acts.

Dr. Jacobs also testified that it was not until his February interview with the Petitioner that he determined that the Petitioner was incompetent to stand trial; however Jacobs admitted that prior to the February interview, it was explained to the Petitioner that if he was able to stand trial, and if found competent, he could be tried for murder. (CT. 330-331).

Although Dr. Baccus testified that he suspected the Petitioner had enough intelligence to deceive people, he also stated that he did not feel that the Petitioner was doing so in this case. (CT. 359, 365). On cross-examination, it was revealed, that in making his diagnosis of the Petitioner, Dr. Baccus did give great weight to an investigate report which was prepared by defense counsel, and which comprised approximately fifty percent of the historical background of the Petitioner. The other fifty percent of Petitioner's historical background came from Baccus' own discussions with the Petitioner. (T. 377-382).

In conclusion, Respondent admits that although the psychiatric testimony may have been able to show some schizophrenic, paranoid type behavior on the part of the Petitioner, this testimony would have been subjected to extensive cross-examination by the district attorney, which may have revealed that the Petitioner was manipulative and deceptive. Moreover, this paranoic or schizophrenic behavior was not necessarily so mitigating that defense counsel should be considered ineffective for failing to call the psychiatrists

at trial, when he did, in fact, call other witnesses who testified as to the Petitioner's strange behavior.

Defense counsel was questioned at the state habeas hearing pertaining to his failure to call psychiatric experts, and he revealed that the decision not to call them had been intentionally made. He felt that the jury was already aware that the Petitioner had a psychiatric problem and that it was not really necessary to put up the expert testimony. (HT. 91-92). He did state, however, that in retrospect he regreted his decision. (HT. 92). Of course, since Petitioner ultimately received the death penalty, this type testimony is understandable, but such self-criticism should not automatically be equated with a constitutional violation.

Petitioner also asserts that his trial attorney was ineffective in failing to introduce into evidence, Petitioner's lack of a prior criminal record. Of course, since there was absolutely no evidence introduced by the State of any prior convictions of Mr. Wallace, and since the State did not refer to any prior criminal convictions during its argument, the jury certainly could not have assumed that Mr. Wallace did have any prior convictions. In fact, in the absence of any evidence by the State pertaining to prior convictions, it was incumbent upon the jury to conclude that Wallace had no prior convictions. Thus, there was no merit to Petitioner's assertions that counsel was ineffective in this area.

In conclusion, a review of Petitioner's allegations pertaining to ineffective assistance shows that he is merely criticizing tactical decisions made by counsel during the heat of trial, or is quarreling with the amount of evidence presented. The Constitution does not require perfect counsel, and the appellate courts should not sit to second guess considered professional judgment with the benefit of 20/20 hindsight. Washington v. Watkins, 655, F.2d 1346, 1355 (5th Cir. 1981); Ford v. Strickland, supra, 696 F.2d at 820. Thus, Respondent submits that this Court should reject Petitioner's second argument.

III. DURING THE SENTENCING PHASE OF PETITIONER'S TRIAL, THE TRIAL JUDGE PROPERLY SUSTAINED THE STATE'S OBJECTIONS TO A WITNESS TESTIFYING AS TO WHETHER OR NOT SHE THOUGHT THAT THE PETITIONER SHOULD BE SENTENCED TO DEATH.

During the redirect examination of defense witness Jenkins, defense counsel inquired as to whether she thought that the Petitioner should be sentenced to death. The trial court sustained the State's objection to this question. (T. 503-504). Petitioner argues that the limitation of this testimony violated the rulings of this Court in Chambers v. Mississippi, 410 U.S. 284 (1973); Lockett v. Ohio, 438 U.S. 586 (1978); and Green v. Georgia, 442 U.S. 95 (1979).

Of course, recently in Green v. Georgia, supra, this Court held that a state may not mechanistically apply its rules of evidence during the sentencing phase of a death penalty case so as to defeat the ends of justice. Id. 442 U.S. at 97, citing Chambers v. Mississippi, supra. In Green the trial court had applied Georgia's hearsay rule during the sentencing phase of Green's trial to exclude testimony from a witness who allegedly overheard Green's co-defendant admit that he was the person who had actually shot and killed the victim in that case. The testimony was permitted at the trial of the co-defendant because it was an inculpatory admission. It was technically inadmissible under Georgia law at Green's trial, because it was hearsay. Under the unique circumstances of Green's case, this Court vacated Green's sentence, finding the ends of justice were not served by applying Georgia's evidentiary law to exclude the testimony during the sentencing phase of Green's trial. Green v. Georgia, supra, 442 U.S. at 97.

In Lockett v. Ohio, supra, this Court examined an Ohio statute which severely limited the circumstances which could be

considered as mitigating against the death penalty. The limited range of these mitigating circumstances was found to be in violation of the Eighth and Fourteenth Amendments to the United States Constitution. The Court concluded that in all except the rarest kind of capital case, the sentencer should " . . . not be precluded from considering as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Id. 438 U.S. at 604. This statement was qualified, however, by a footnote wherein the Court also stated, "nothing in this opinion limits the traditional authority of a court to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record or the circumsances of the offence." Id. 438 U.S. at 604, n. 12.

In Petitioner's case, defense counsel was attempting to elicit from the witness, a personal opinion which in fact, was the ultimate issue to be decided by the jury. It did not pertain to any mitigating circumstance, and this opinion by the witness was immaterial. Moreover, as noted by the Georgia Supreme Court, this witness who was Appellant's first teacher, was permitted to testify pertaining to numerous facts and circumstances relating to the Appellant's life which were allegedly mitigating.

In conclusion, since witness Jenkins was permitted to testify pertaining to numerous facts about the Appellant's life, and since the excluded testimony dealt only with the ultimate issue which was to be decided by the jury, the Georgia Supreme Court correctly affirmed the ruling of the trial court excluding her opinion about the sentence which Petitioner should have received. Thus, Respondent submits that this Court should not grant the writ in order to review Petitioner's third and final argument.

CONCLUSION

For all of the aforesaid reasons Respondent respectfully submits that this Court should deny Petitioner's request for a writ of certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, NICHOLAS G. DUMICH, attorney of record for the Respondent, and a member of the Bar of the Supreme Court of the United States, hereby certify that in accordance with the rules of the Supreme Court of the United States, I have this day served counsel for the Petitioner with a true and correct copy of the attached Brief for the Respondent in opposition, by depositing same in the United States Mail with adequate postage affixed thereon to assure proper delivery and properly addressed to:

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This 11th day of March, 1983.

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